LIM KIT SIANG

v.

PEMANGKU KETUA POLIS DAERAH, BUTTERWORTH & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-15-1986]
12 MAY 1986

CIVIL PROCEDURE: *Applications to strike out writ of summons and statement of claim - On ground of being frivolous, vexatious and an abuse of process of the Court - Whether the writ and the statement should be struck out.*

There were two applications before the Court - the first, by the 5th defendant (the Prime Minister), and the second jointly by the 4th and 7th defendants (the State Secretary, Pulau Pinang and the Government of the State of Penang respectively) - for orders that the writ of summons and statement of claim, in so far as they were concerned, be struck out, as disclosing no reasonable cause of action and as being frivolous, vexatious and an abuse of the process of the Court, under the provision of O. 18 r. 19.

Mr. Lim Kit Siang, Member of Parliament, Leader of the Opposition and the plaintiff herein had brought this action claiming that he had been the victim of unfair discrimination in the matter of his application for a permit under s. 27(1) of the Police Act 1967, to address an assembly of persons at a proposed political rally on 7 March 1986 at Butterworth. The said application had been considered, first, by the 1st defendant, and then on appeal, by the 2nd defendant (the Pemangku Ketua Polis, Pulau Pinang), and rejected. The plaintiff therefore claimed that as a result there had been a violation of Article 8(1) of the Constitution.

To illustrate, the plaintiff referred to a similar but successful application made on 21 February 1986 by the 4th defendant, whose principal is the 7th defendant, to enable the 5th defendant to address a similar assembly of persons the next day, also at Butterworth. The plaintiff contended that as it is fundamental that like cases should be treated alike, his application too ought to have been granted.

Held:

[1] From the affidavit evidence, it was obvious that the 5th defendant played no part in the consideration and the rejection of the plaintiff's application for a permit both at first instance and at the appellate stage. He had no say in the matter at all. He was not even consulted upon it nor, for that matter, was it even alleged that he had any prior knowledge of it. The Court therefore failed to see how he could be concerned in a suit whose sole purpose was to establish that the plaintiff was a victim of unfair discrimination by reason of the actions of the 1st and 2nd defendants.

[2] The Court failed to see how the 4th and 7th defendants could have had any interest legal or equitable in any of the reliefs claimed, especially as it concerned an event long since past and whose purpose had been achieved. Moreover, as in the case of the 5th defendant, they had no hand whatsoever in the grant of the permit concerned.

[3] In the result the applications of the 5th defendant and of the 4th and 7th defendants succeeded.

[Costs to 5th and to 4th and 7th defendants.]

Cases referred to:
Attorney-General of Duchy of Lancaster v. L. & N.W. Railways Co. [1892] 3 Ch 274
Tucker v. Collinson 3 WR 354
Wenlock v. Moloney [1965] 1 WLR 1238
Nagle v. Feilden [1966] 2 QB 623
Moore v. Lawson [1915] 31 TLR 418
Drummond-Jackson v. British Medical Association [1970] 1 WLR 688
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52
In re I.G. Farbenindustrie A.G.Agreement [1944] 1 Ch 41
Gould v. National Provincial Bank Ltd. & Anor. [1960] 1 Ch 337
Heatley v. Newton [1881] 19 Ch D 326
Amon v. Raphael Tuck and Sons Ltd. [1956] 1 QB 357

Legislation referred to:
Federal Constitution, art. 8(1)
Police Act 1967, s. 27(1)

For the applicant/5th defendant (and also for 1st, 2nd, 3rd & 6th defendants) - Selventhiranathan, SFC
For the applicants/4th & 7th defendants - Mohd. Saari bin Yusoff, State Legal Adviser, Penang
For the plaintiff/respondent - Karpal Singh; (N. Shanmugam and Gooi Hock Seng with him)

JUDGMENT

Edgar Joseph Jr J:

At the conclusion of the arguments on the two applications which were before the Court - the first, by the fifth defendant and the second jointly by the fourth and seventh defendants - for orders that the writ of summons and statement of claim, in so far as they were concerned, be struck out, as disclosing no reasonable cause of action and as being frivolous, vexatious and an abuse of the process of the Court, under the provision of O. 18 r. 19 ("the Rule") and under the inherent jurisdiction of the Court, I reserved my decision for six days and then made orders in terms thereof. I indicated then that I would give my reasons in writing for that decision and I now proceed to do so.

Mr. Lim Kit Siang, Member of Parliament, Leader of the Opposition and the plaintiff herein, had brought this action, claiming in effect, that he had been the victim of unfair discrimination in the matter of his application for a permit under s. 27(1) of the Police Act 1967, to address an assembly of persons at a proposed political rally on 7 March 1986 at Butterworth.

That application had been considered, first, by Pemangku Ketua Polis Butterworth, the first defendant, and then on appeal, by the Pemangku Ketua Polis, Pulau Pinang, the second defendant, and rejected. The plaintiff therefore claimed that as a result there had been a violation of Article 8(1) of the Constitution.

To illustrate, the plaintiff referred to a similar but successful application made on 21 February 1986 by the State Secretary, Pulau Pinang, the fourth defendant, whose principal is the Government of the State of Penang, the seventh defendant, to enable the Prime Minister, the fifth defendant, to address a similar assembly of persons, on the next day, also at Butterworth. In other words, the plaintiff was saying, that as it is fundamental that like cases should be treated alike, his application, too, ought to have been granted.

Before I embark upon a consideration of the issues which arise for decision it may be well to keep in mind certain well settled principles.

Firstly, although the Rule states that the orders prayed for may be made "at any stage" of the proceedings, still the application should always be made promptly and, as a rule, before the close of the pleadings, and where the statement of claim is under attack, before the defence is served: *Attorney-General of Duchy of Lancaster v. L. & N.W. Railways Co.* [1892] 3 Ch 274. However, the Court has a discretion so that an application may be made even after the pleadings are closed: *Tucker v. Collinson* 3 WR 354.

In the present case, although the fifth defendant had entered a conditional appearance and made the application herein soon after that, the fourth defendant and the seventh defendant, having entered an unconditional appearance and filed a Joint Defence made their application herein only thirty two days later.

Clearly, therefore, the application by the fourth defendant and the seventh defendant was not promptly made. However, I do not consider that the delay was so great as to debar them from being heard at this stage especially since there has been no suggestion that it has occasioned any prejudice to the plaintiff.

Secondly, where the only ground on which to strike out the application is made, is that the pleading discloses no reasonable cause of action, no evidence is admitted. (See *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company's case* - (*ibid* at 278). Similarly, where the only ground on which the Statement of Claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible: *Wenlock v. Moloney* [1965] 1 WLR 1238. But, in applications on any of the other grounds mentioned in the Rule or, where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and is ordinarily used.

Thirdly, the summary procedure to strike out under the Rule can only be adopted when it can be clearly seen that the claim or answer is, on the face of it, "obviously unsustainable". (See *Attorney-General of The Duchy of Lancaster v. London and North Western Railway Company's case* (*ibid*)). To put the same point another way, it is only in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the Court and unarguable, that the summary remedy will be applied. (Per Danckwerts and Salmon LJ J in *Nagle v. Feilden* [1966] 2 QB 623 at pp. 648, 651). It cannot, therefore, be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. (See *Wenlock v. Moloney* (*ibid*)). So long as the Statement of Claim or the particulars disclose some cause of action or raises some question to be decided by a Judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out: *Moore v. Lawson* [1915] 31 TLR 418. A reasonable cause of action therefore means a cause of action with some chance of success where only the allegations in the pleading are considered (per Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688).

In considering the applications before me, I had kept in the forefront of my mind the above principles.

I shall take firstly the case of the fifth defendant.

I asked myself, firstly, whether the fifth defendant had a legal interest in the subject-matter; in other words, an interest which the law recognises and not a mere curiosity in the result of the litigation. This, I think, is one of the tests to be applied in deciding whether or not a litigant may qualify to be added as a party in a pending suit. But, perhaps a better way of expressing the test is: "Will his rights against or liabilities to any party to the action in respect

of the subject-matter of the action be directly affected by any order which may be made in the action?" (Per Lord Diplock LJ in *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 52).

Although Lord Diplock was in that case concerned with an application for leave to intervene, I see no reason why the same test should not be applied where, as here, the applications are to strike out a party since the principle applicable is the same, If I am right in this, then I am fortified by the following passage in the judgment of Greene M.R. In *re I.G. Farbenindustrie AG Agreement* [1944] 1 Ch 41:

> It is argued by Mr. Valentine Holmes that in view of the language of the Patents, & c. (Emergency) Act, 1939, Boots have a legal interest in the subject-matter of the summons to which they seek to be added as a party. He confessed himself, however, unable to find any words which could appropriately describe the nature of that legal interest and I share his difficulty. He pointed out that under the licence and the Patents, & c. (Emergency) Act, 1939, his clients are entitled to bring proceedings in their own name, but that is also possible under ss. 24 and 27 of the Patents Acts, for the grantee of a compulsory licence granted under those sections can in certain circumstances bring an action for infringement in his own name. It seems, however, clear that such a right in a licensee has nothing to do with the subject-matter of these proceedings which relate solely to the legal title to these patents. Ought that title to be vested in Bayers, or ought it to remain vested in I.G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view. When I say "legal interest" I am not thinking of any distinction between a legal and an equitable interest, but of an interest which the law recognizes.

In this context, I also find the following passage in the judgment of Russell J in *Gould v. National Provincial Bank Ltd. & Anor.* [1960] 1 Ch 337, when considering the question whether a litigant was cited as a proper defendant in an application for discovery to be germane to the issue before me:

> In my view, there is, in this case, what I may describe as a special and earlier point. If the second defendant be not a party to the proceedings, the question is should discovery be ordered against him because in fact he has remained a party. If he is not a proper party, I am clearly of opinion that discovery should not be ordered since it would mean this, that he would be being retained as a party for no purpose other than discovery. I consider that the second defendant in this case is not a proper party.
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> The relief claim is, first, "a declaration that the legal charge...and the three guarantees... are invalid and ought "to be set aside"." The second defendant is not a party to either the legal charge which is between the plaintiff and the bank, or to any of the three guarantees which are guarantees of the second defendant's overdraft with the bank. The second claim is: "Further or in the alternative rescission of the said documents "or the respective transactions effected thereby"." The third is: "Delivery up of the said documents for cancellation." The second defendant, in my view, has no legal or equitable interest in either the legal charge or any of the three guarantees. I think that that can be tested by inquiring whether, should the plaintiff and the bank choose, as a matter of agreement between them, to tear up the guarantees or the charge by way of legal mortgage, the second defendant would have any say in the matter at all, either in law or in equity. If, as I think, he would have no say, I cannot see how he can be concerned in an action whose only purpose, in effect, is to seek on the one hand the tearing up or destruction of these documents, or on the other hand, their preservation and the establishment of their validity.
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> It is suggested by Mr. Sparrow that the second defendant is interested in this way, that it is his banking account which is being guaranteed and the legal charge is in support of those guarantees. Of course, in a sense, he is interested; but it seems to me that, for a person to be a proper party to an action of this nature, it is essential that he should be legally or equitably interested in some part of the relief claimed.

Turning to the particular circumstances of the two applications before me, it is obvious from the affidavit evidence that the fifth defendant played no part in the consideration and the rejection of the plaintiff's application for a permit both at first instance and at the appellate stage. He had no say in the matter at all. He was not even consulted upon it nor, for that matter, was it even alleged that he had any prior knowledge of it. I therefore failed to see how he could be concerned in a suit whose sole purpose was to establish that the plaintiff was a victim of unfair discrimination by reason of the actions of the first defendant and the second defendant. The fifth defendant is therefore in no way legally or equitably interested in any of the reliefs claimed by the plaintiff within the meaning of the authorities cited.

For the reasons stated, I made an order in terms of the fifth defendant's application and for costs.

I now pass on to consider the application by the fourth defendant and the seventh defendant.

The observations I have made when considering the application of the fifth defendant appear to me to be applicable, *mutatis mutandis*, to their application as well.

I had not overlooked the fact that in the case of the fourth defendant, prayer 4 of the statement of claim sought a declaration that the grant of the permit to him by the third defendant was unlawful. As a matter of fact, during the argument, I had asked Mr. Karpal Singh in what way the contents of the statement of claims supported this particular prayer because, as far as I could make out, its entire theme was that like cases should be, but were not treated alike; that is to say, whilst the fourth defendant's application for a permit was granted, that of the plaintiff's was refused, when there were no valid grounds for discriminating between the two. In other words, nowhere in the statement of claim was it alleged that both the fourth defendant's and the plaintiff's applications for permits should have been dismissed and not just the latter. Accordingly, I failed to see how the existence of prayer 4 of the statement of claim established a cause of action against the fourth defendant and, consequently, against the seventh defendant.

However, on my invitation, Mr. Karpal Singh amended the statement of claim by adding the following paragraphs:

> 13(a). The third defendant issued licence dated 21 February 1986, to the fourth defendant for the purpose primarily or solely for the fifth defendant to address the gathering at the Municipal Council padang, Butterworth on 22 February 1986.
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> ...
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> 14(a). The plaintiff pleads further or in the alternative the licence dated 21 February 1986 issued by the third defendant to the fourth defendant for the purpose primarily or solely for the fifth defendant to address the gathering referred to in para. 13(a) herein is unlawful for the reason the third defendant did not adequately or at all apply his mind to the application for the said licence which was only made at the eleventh hour and/or had no power to issue the said licence.

I had therefore to give consideration to the amended statement of claim.

But, having done so, I failed to see how the fourth and seventh defendants could have had any interest legal or equitable in any of the reliefs claimed, especially as it concerns an event long since past and whose purpose has been achieved.

Moreover, as in the case of the fifth defendant, these defendants had no hand whatsoever in the grant of the permit concerned by the third defendant to the fourth defendant.

I had not overlooked the point made by Mr.Karpal Singh that it was important for purposes of establishing the plaintiff's case that he has the opportunity of cross-examining the fourth defendant and the fifth defendant. I am afraid that this was not a valid ground for allowing them to continue as parties. Here, I should like to refer, to the following passage in the judgment of Lush LJ in *Heatley v. Newton* [1881] 19 Ch D 326:

> ... I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them; but it appears to me that where they are properly made defendants it is a ground for not letting them off summarily, that there is a very great advantage accruing to the plaintiffs from being at liberty to interrogate them instead of simply calling them as witnesses at the trial.

Looking back, I had also asked myself whether if the plaintiff succeeds in obtaining the declarations prayed for this will affect the fourth defendant, the fifth defendant and the seventh defendant in the enjoyment of their rights. This was the test applied by Devlin J. in *Amon v. Raphael Tuck and Sons Ltd.* [1956] 1 QB 357 when considering an application for leave to intervene. He said at p. 371:

> If this is the correct line of authority to apply then I think the test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal right?'

Later he said at p. 381:

> It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally - that is by curtailing his legal rights.

In the result, the application of the fourth defendant and, consequently that of the seventh defendant, his principal, also succeeded, and with costs.

Also found at [1986] 2 CLJ 145